No. 76-1770

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, LOCAL 433, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

CHARLES P. DONNELLY,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 549 F. 2d 634. The decision and order of the National Labor Relations Board (Pet. App. 15-27) are reported at 218 NLRB 848. The Board's earlier decision and determination of dispute in a proceeding under Section 10(k) of the National Labor Relations Act (Pet. App. 28-42) are reported at 214 NLRB 912.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977 (Pet. 2). The petition for a writ of certio-

rari was filed on June 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly refused to permit relitigation in the unfair labor practice proceeding of an issue which had previously been litigated and decided in a proceeding to resolve the underlying jurisdictional dispute, when the relevant evidence of record was not challenged and no new evidence was tendered.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the petition at pp. 2-4.

STATEMENT

In 1973, Plaza Glass Company ("the Company") contracted to fabricate and install windows and doors for an apartment construction project in Southern California. Pursuant to its collective bargaining agreement with the Glaziers, Glassworkers and Glass Warehouse Workers Union, Local 636 ("the Glaziers"), the Company intended to employ persons represented by the Glaziers to perform the work (Pet. App. 2). However, in January 1974, a representative of petitioner Union ("the Ironworkers") demanded that the Company assign the work to its members, rather than to the Glaziers. On several occasions representatives of the Ironworkers threatened to slow down or stop the project unless its members were hired. The Glaziers took the position that reassignment of the work would violate the contract it had with the Company and would be grounds for picketing the job site. (*Ibid.*)

Upon charges filed by the Company against both unions alleging a violation of Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D),[1] the Board's Regional Director ordered a hearing to resolve the underlying jurisdictional dispute, pursuant to Section 10(k) of the Act, 29 U.S.C. 160(k).[2] At this hearing, all parties appeared and presented evidence, and were allowed to cross-examine witnesses (Pet. App. 17). The Ironworkers claimed that the Board lacked jurisdiction to hear and determine the dispute because the parties, including the Company, had agreed upon a voluntary method for resolving the dispute (Pet. App.

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[1]Section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D), in relevant part, makes it an unfair labor practice for a labor organization or its agents "to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is—

> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *."

[2]Section 10(k), 29 U.S.C. 160(k), provides:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

2-3). After reviewing the evidence in support of the Ironworkers' contention—namely, a clause in the Company's performance contract binding it to submit disputes to a private tribunal—the Board found that this tribunal was defunct as of the time at issue and the Company had not agreed to be bound by decisions of the successor tribunal. The Board accordingly concluded that there did not exist any voluntary method of adjustment to which the parties were bound (Pet. App. 34-36). After determining that there was reasonable cause to believe that the Ironworkers had engaged in conduct proscribed by Section 8(b)(4)(D), 29 U.S.C. 158(b)(4)(D) (Pet. App. 34), the Board proceeded to determine the dispute on the merits. It concluded, after consideration of the relevant factors, that the Glaziers were entitled to perform the work in dispute (Pet. App. 37-40).

When the Ironworkers refused to comply with the Section 10(k) award, the General Counsel of the Board issued a complaint alleging that the Union had violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D). The Board found that the Ironworkers' answer merely placed in issue the same matters which had been raised and litigated in the Section 10(k) proceeding, and that the Union offered no evidence that had not been presented in that proceeding (Pet. App. 19). The Board further found, based upon the undisputed evidence in the entire record, that the Ironworkers had engaged in conduct proscribed by Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D) (Pet. App. 20). Accordingly, the Board granted the General Counsel's motion for summary judgment and ordered the Ironworkers to cease and desist from unlawfully threatening work stoppages in support of its jurisdictional demands. (Pet. App. 15-27.)

The court of appeals enforced the Board's order (Pet. App. 1-14).

ARGUMENT

Petitioner's sole contention (Pet. 7) is that it should have been permitted to relitigate, in the Section 8(b)(4)(D) unfair labor practice proceeding, the issue whether there was an agreed-upon method for resolving the jurisdictional dispute among the parties, although this issue had previously been litigated and decided in the proceeding pursuant to Section 10(k) of the Act, 29 U.S.C. 160(k). The court below properly rejected this contention, and its holding is in accord with that of other courts of appeals that have had occasion to consider the question. See *Bricklayers, Masons & Plasterers Intl. Union of America* v. *National Labor Relations Board*, 475 F. 2d 1316, 1322 (C.A. D.C.); *National Labor Relations Board* v. *International Longshoremen's Ass'n, Local 1576*, 409 F. 2d 709, 710 (C.A. 5). Thus, no issue warranting review by this Court is presented.

When a charge is filed under Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D), the provision dealing with jurisdictional disputes, the Board must, under Section 10(k) of the Act, 29 U.S.C. 160(k), "hear and determine the dispute out of which [the] unfair labor practice shall have arisen, unless * * * the parties to such dispute" adjust or agree upon a method for the voluntary adjustment of the dispute. The purpose of Section 10(k), 29 U.S.C. 160(k), is to "induce unions to settle their differences without awaiting unfair labor practice proceedings and enforcement of Board orders by courts of appeals." *International Telephone & Telegraph Corp.* v. *Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428, 431. If a union does

not abide by a determination made by the Board pursuant to Section 10(k), 29 U.S.C. 160(k), a complaint may then issue upon a Section 8(b)(4)(D) unfair labor practice charge.

This Court has recognized that Section 8(b)(4)(D) and Section 10(k) proceedings are separate, that the "findings and conclusions in a § 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination," and that "[b]oth parties may put in new evidence at the § 8(b)(4)(D) stage." *International Telephone & Telegraph Corp., supra*, 419 U.S. at 446-447, quoting from *National Labor Relations Board* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 122 n. 10. However, the Court has also recognized that the "same issues will generally be relevant, the record of the earlier proceeding will be admitted in the later one, 29 C.F.R. § 102.92, and the Board's ruling on the merits of those issues which are common to the two proceedings is likely to be the same in the one as in the other." *International Telephone & Telegraph Corp., supra*, 419 U.S. at 447.

The procedure followed by the Board in this case comported with these principles. Petitioner was accorded a full opportunity to, and did, litigate in the Section 10(k) proceeding the question whether a voluntary method of adjusting the dispute existed. The Board, after reviewing the record in that proceeding, concluded that there was no such mechanism. The record of the Section 10(k) proceeding was introduced in the subsequent Section 8(b)(4)(D) proceeding. Petitioner did not offer any new evidence on this question, but simply asserted that it had a right to a *de novo* determination of the question in the Section 8(b)(4)(D) proceeding. In these circumstances, the Board could properly bar relitigation of the question whether a voluntary method of adjustment existed.

Petitioner contends that the Board gave *res judicata* effect to the prior proceeding, in contravention of the procedures approved in *International Telephone*, and thereby failed to apply the proper statutory standard in determining whether an unfair labor practice had occurred (Pet. 10). The Board, however, indicated a willingness to accept new evidence, if any existed (Pet. App. 20). Further, the Board made its determination of unfair labor practices on the whole record before it and in so doing, as the court of appeals held (Pet. App. 8), applied the "preponderence of the evidence" standard required to support a violation of Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D).

Indeed, the propriety of the Board's procedures seems to be all but settled by this Court's decisions regarding the closely analogous Board proceedings relating to unfair labor practice allegations arising out of representation disputes, pursuant to Section 9 of the Act, 29 U.S.C. 159. If there is a dispute as to the proper bargaining unit, the Board follows procedures similar to those in Section 10(k) hearings to determine the bargaining unit. Compare 29 C.F.R. 102.60 *et seq.* with 29 C.F.R. 102.89 *et seq.* These procedures, like those under Section 10(k), do not conform with Section 554 of the Administrative Procedure Act, 5 U.S.C. 554, in several respects.[3] Yet this Court has held that once the repre-

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[3]For example, under neither procedure do hearing officers prepare findings of fact and conclusions of law. 29 C.F.R. 102.66(f), 102.90. See 5 U.S.C. 557.

sentation issue is fully litigated in the representation proceeding under Section 9 of the Act, 29 U.S.C. 159, the Board need not allow the issue to be relitigated in a related unfair labor practice proceeding determining whether the employer has unlawfully refused to bargain with the union certified in the representation proceeding, unless new evidence is offered by the parties. *Pittsburgh Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 162; *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137, 141. As this Court stated: "If the Company or the * * * Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative [of that given in the earlier proceeding]. Nothing more appearing, a single trial of the issue was enough." *Pittsburgh Glass Co.* v. *National Labor Relations Board, supra*, 313 U.S. at 162.

Similarly, in this case, "a single trial of the issue" of the existence of a voluntary method of adjustment was enough.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

CHARLES P. DONNELLY,
Attorney,
National Labor Relations Board.

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